

## THE FEDERALIST IN THE SUPREME COURT

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The authors of the series of anonymous newspaper articles afterwards known to fame as "The Federalist" had no intention of compiling a law book. They were addressing the people at large and their aim was to influence public opinion, not to formulate principles for the guidance of courts. No one foresaw the possibility that what they were writing would some day be cited in the law reports along with Blackstone and Kent.

It was the critical hour of American history when these essays (there were eighty-five of them, each addressed "To the People of the State of New York" and signed "Publius") made their appearance in the New York newspapers. The proposed Federal Constitution, framed behind closed doors by Washington and his associates in the Constitutional Convention of 1787, had just been made public and submitted to the States for ratification. That Convention, authorized merely to revise the Articles of the existing Confederation, had exceeded its authority and prepared a new plan of union on radically different lines. A storm of attack and denunciation had broken and the fate of the new proposals hung in the balance. They were bitterly assailed on the platform and in the press, notably in a series of papers signed "Cato" (probably the pseudonym of Governor George Clinton of New York), and another able series signed "Brutus", written by Judge Robert Yates of the New York Supreme Court who had been a delegate to the convention. The "Publius" letters, primarily written for the purpose of answering the arguments of Cato and his fellow pamphleteers, were a part of the controversial literature of a bitterly controversial period. Moreover they were written in extreme haste, by young men. Hamilton who originated the idea and wrote a majority of the papers was only thirty. Madison his chief associate in the work was thirty-six. It seems little short of miraculous that these men, working under such conditions of controversy and haste, should have produced what they actually brought forth—a reasoned and profound treatise on the American scheme of government, destined to affect the course of political thought throughout the world.

Perhaps the most impressive of all the tributes to the greatness of "The Federalist" has been the deference paid to it in decisions of the United States Supreme Court. From the days of Chief Justice Oliver Ellsworth down to the present time these unofficial newspaper essays have frequently been called upon by the highest tribunal of the nation for help in solving the nation's problems. Yet amid all the editions, translations, commentaries and discussions of disputed questions of authorship, text and bibliography no collection of these Supreme Court

citations seems ever to have been attempted until the present writer approached the subject in an introduction to a recent edition.<sup>1</sup> This paper is written in an effort to supply the omission.

Apparently the earliest reference to *The Federalist* in reported decisions of the United States Supreme Court occurs in the opinion of Judge Samuel Chase of Maryland in *Calder v. Bull*,<sup>2</sup> decided in the year 1798. The case, which came up from the Supreme Court of Errors of Connecticut, involved the validity of a Connecticut statute asserted to violate the provision of the Federal Constitution forbidding the States to pass *ex post facto* laws. It is probably the leading American authority on the subject of such laws. Justice Chase, after a learned discussion of the meaning of the term, remarks:

"The celebrated and judicious *Sir William Blackstone*, in his commentaries, considers an *ex post facto law* precisely in the *same* light I have done. His opinion is confirmed by his successor, *Mr. Wooddeson*; and by the author of *the Federalist*, who I esteem superior to *both*, for his extensive and accurate knowledge of the *true principles of Government*." (Italics from original report.)

It seems highly probable that Justice Chase thought, when he penned this flattering reference to "the author of the *Federalist*," that he was eulogizing Alexander Hamilton. The learned Justice was an ardent *Federalist*, so obnoxious to the partisans of Jefferson that they afterwards tried to drive him from the bench by impeachment. As matter of fact, however, *Federalist* number XLIV in which the *ex post facto* clause of the Constitution is discussed is now by common consent credited to Madison.

The next reference to *The Federalist* occurs in the argument of counsel (C. Lee of Virginia) in the report of *Stuart v. Laird*.<sup>3</sup> Like references occur frequently in arguments of counsel in other cases reported in subsequent volumes. No further citation has been found, however, in any opinion of the Court until the celebrated case of *Fletcher v. Peck*,<sup>4</sup> decided in the year 1810. This was the case in which, for the first time, the Supreme Court of the United States pronounced a state statute unconstitutional. The opinion of the Court was delivered by Chief Justice Marshall. The mention of *The Federalist* is found in the separate opinion delivered by Judge William Johnson, who refers to it as

"the letters of Publius, which are well known to be entitled to the highest respect."

Apparently the first reference to *The Federalist* in an opinion delivered by Chief Justice Marshall is found in *McCulloch v. Maryland*,<sup>5</sup>

<sup>1</sup> G. P. Putnam's Sons (1923).

<sup>2</sup> 3 Dall. 386, 391.

<sup>3</sup> (1803) 1 Cranch, 299, 304.

<sup>4</sup> 6 Cranch, 87, 144.

<sup>5</sup> 4 Wheat. 316, 433-435.

decided in 1819. This was the Federal Bank Tax case in which Marshall elaborated his famous doctrine of implied powers. The arguments of counsel in the case had put much stress upon Hamilton's discussion in *The Federalist* of the taxing power.<sup>6</sup> Chief Justice Marshall said:

"In the course of the argument, the *Federalist* has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed."

The opinion then proceeds to discuss and explain *The Federalist* argument at considerable length.

After this decision references to *The Federalist* become more frequent. It was cited twice in cases decided in the following year (1820); once in an opinion of Justice Bushrod Washington<sup>7</sup> and again in an opinion of Justice Story.<sup>8</sup>

In 1821 Chief Justice Marshall again invoked *The Federalist*, this time in the celebrated case of *Cohens v. Virginia*,<sup>9</sup> in which was asserted the supremacy of the Federal judiciary over State courts in questions arising under Federal laws. The Chief Justice quotes at length from *Federalist* LXXXII (Hamilton) on the subject of the appellate jurisdiction of the Supreme Court, prefacing the quotation with the following statement:

"The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it."

John Marshall presided over the Court for fifteen years longer, and during this period references to the *Federalist* were numerous. They are found in opinions delivered by the Chief Justice and Justices Story, Trimble, Thompson and Baldwin.

<sup>6</sup> *Ibid.* Hopkins at pp. 344, 345, 348, 349, 351; Jones at pp. 363, 370; Martin at p. 372.

<sup>7</sup> *Houston v. Moore*, 5 Wheat. 1, 25.

<sup>8</sup> *United States v. Smith*, 5 Wheat. 153, 159.

<sup>9</sup> 6 Wheat. 264, 418-419.

With the passing of Marshall and the accession of Taney as Chief Justice a new chapter opened in the history of the Court. The Federalists as a political party had become extinct. Andrew Jackson had come into power and it had fallen to his lot to fill a majority of the seats upon the bench by appointments to vacancies. The result was at once apparent in the attitude of the Court upon constitutional questions. The Federalist, however, continued to be cited with even more frequency than before. It would be tedious to refer to all the citations during this period but a few of them may be mentioned briefly.

In *City of New York v. Miln*,<sup>10</sup> a case originally argued during the lifetime of Chief Justice Marshall, reargued after his death and finally decided in opposition to his known views, Federalist XLV (Madison) is cited in the opinion of Justice Barbour.

In *Prigg v. Pennsylvania*,<sup>11</sup> the famous case upholding the right under Federal law to reclaim a fugitive slave and declaring unconstitutional a statute of Pennsylvania forbidding the removal of colored persons from the state for the purpose of enslaving them, Justice Story, writing for the Court, cites a remark of Madison in Federalist No. XLIII.

In the *License Cases*,<sup>12</sup> in which certain state statutes regulating the selling of intoxicants were held not inconsistent with the Commerce Clause of the Federal Constitution, Justice Catron quotes Federalist No. XXXII (Hamilton) and adds:

"It is an historical truth, never, so far as I know, denied, that these papers were received by the people of the States as the true exponents of the instrument submitted for their ratification."

In *Luther v. Borden*,<sup>13</sup> the leading case on the proposition that the Supreme Court cannot deal with questions of a political character, Justice Woodbury, dissenting, cites various numbers of The Federalist.

In the *Passenger Cases*,<sup>14</sup> the question involved was the constitutionality of certain state statutes imposing taxes upon alien passengers arriving in the ports of those states. There was no opinion of the Court, the judges announcing their opinions separately. Citations of The Federalist are found in the opinions of Justices McLean<sup>15</sup> and McKinley<sup>16</sup> and in the dissenting opinions of Chief Justice Taney<sup>17</sup> and Justices Daniel<sup>18</sup> and Woodbury.<sup>19</sup> The references are more numerous than in any other case found in the reports.

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<sup>10</sup> (1837) 11 Pet. 102, 133.

<sup>11</sup> (1842) 16 Pet. 539, 616.

<sup>12</sup> (1848) 5 How. 504, 606, 607.

<sup>13</sup> (1849) 7 How. 1, 53, 54, 70, 77.

<sup>14</sup> (1849) 7 How. 283.

<sup>15</sup> *Ibid.* 396.

<sup>16</sup> *Ibid.* 453.

<sup>17</sup> *Ibid.* 471, 474, 479.

<sup>18</sup> *Ibid.* 503, 504, 511.

<sup>19</sup> *Ibid.* 526, 533, 534, 543, 545, 554-555.

In *Cooley v. Board of Wardens*,<sup>20</sup> the leading case on the right of the States to regulate pilotage, Justice Benjamin R. Curtis cites Federalist No. XXXII (Hamilton) as giving the contemporary exposition of the Constitution to the effect that the mere grant to Congress of the power to regulate commerce did not necessarily imply a prohibition on the States to exercise the same power.

In *Dodge v. Woolsey*,<sup>21</sup> a case upholding the jurisdiction of courts of equity over a corporation at the suit of stockholders to enjoin payment of an unconstitutional tax, and holding invalid provisions of the Ohio statutes and State Constitution, Justice Wayne, writing for the Court, cites Federalist XLIII (Madison) and quotes at length from Federalist XXII, written by Hamilton but erroneously attributed by the learned Justice to Madison. Justice Campbell, in his dissenting opinion,<sup>22</sup> quotes Federalist XXXII (Hamilton).

In *Dred Scott v. Sandford*,<sup>23</sup> the disastrous excursion of the Court into the political field which played so important a part in the events preceding the Civil War, The Federalist was cited in the opinion of Chief Justice Taney writing for the Court and the separate opinion of Justice Campbell.<sup>24</sup> Both references are to Federalist XXXVIII in which Madison characterizes the acquisition of the Northwestern Territory by the Confederate States in 1788 as an exercise of power not warranted by constitutional authority and dangerous to the liberties of the people.

With the death of Chief Justice Taney and the opening of the reconstruction period the political complexion of the Court again changed. The Court was practically reconstructed by appointments made by President Lincoln and his immediate successors, and it seems to have been generally expected that the change would be reflected in the attitude of the Court toward constitutional questions, especially questions involving State rights. This expectation was for the most part doomed to disappointment. The reorganized Court displayed an unexpected solicitude for the rights of the States and firmness against Federal encroachment. A few of the cases of this period in which decisions in favor of State rights were buttressed by citations from The Federalist may be briefly mentioned.

In *Gilman v. Philadelphia*,<sup>25</sup> the Court refused to enjoin the erection by the City of Philadelphia of a bridge asserted to constitute an interference with the Federal power to regulate commerce. Justice Swayne, writing for the Court, cites Federalist XXXII (Hamilton)

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<sup>20</sup> (1851) 12 How. 299, 318.

<sup>21</sup> (1856) 18 How. 331, 357.

<sup>22</sup> *Ibid.* 376.

<sup>23</sup> (1857) 19 How. 393, 447.

<sup>24</sup> *Ibid.* 503.

<sup>25</sup> (1866) 3 Wall. 713, 730.

as to the cases in which there is an exclusive delegation of power by the Constitution to the Federal Government.

In *Lane County v. Oregon*,<sup>26</sup> upholding the right of a state to require that taxes be collected in coin and declaring that the Federal Legal Tender Act had no reference to taxes imposed by state authorities, Chief Justice Chase cites Madison's remark in the Federalist that "The Federal and State Governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."

In *The Justices v. Murray*,<sup>27</sup> the Court held unconstitutional as violating the jury trial provision of the Seventh Amendment so much of a wartime act of Congress as provided for the removal of a judgment in a state court to the Circuit Court of the United States for a retrial. Justice Nelson, delivering the opinion of the Court, cited Federalist LXXXI and LXXXII (Hamilton).

In the *Legal Tender Cases*,<sup>28</sup> The Federalist was cited in the dissenting opinions of Chief Justice Chase,<sup>29</sup> Justice Clifford<sup>30</sup> and Justice Field.<sup>31</sup>

Recent years have found the Supreme Court citing The Federalist less frequently than it did in the reconstruction period or the days of Marshall and Taney. Problems arising out of experiments in governmental activity unforeseen in the days of Hamilton and Madison (Interstate Commerce Act, Anti-Trust Laws, Social Welfare legislation and the like) are coming to occupy more and more of the time and attention of the Court. Nevertheless when occasion arises the authority of the Publius letters is still wont to be invoked. To mention a few modern instances, it was invoked in the so called "Original Package Case"<sup>32</sup> in the famous "Income Tax Cases"<sup>33</sup> involving the constitutionality of the Federal Income Tax Law of 1894; in the case holding the Federal Stamp Tax on a foreign bill of lading unconstitutional as a tax on exports;<sup>34</sup> in the case involving the question of power to enforce a judgment rendered against a state;<sup>35</sup> in the case involving the

<sup>26</sup> (1869) 7 Wall. 71, 76.

<sup>27</sup> (1870) 9 Wall. 274, 279, 281-282.

<sup>28</sup> (1871) 12 Wall. 457.

<sup>29</sup> *Ibid.* 585.

<sup>30</sup> *Ibid.* 608, 621.

<sup>31</sup> *Ibid.* 665, 666.

<sup>32</sup> *Leisy v. Hardin* (1890) 135 U. S. 100, 109; 10 Sup. Ct. 681, 684 (Fuller, C. J.).

<sup>33</sup> *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 558, 560, 564, 15 Sup. Ct. 673, 681, 683 (Fuller, C. J.); on reargument (1895) 158 U. S. 601, 623, 625, 627, 15 Sup. Ct. 912, 915, 916 (Fuller, C. J.).

<sup>34</sup> *Fairbank v. United States* (1901) 181 U. S. 283, 309, 21 Sup. Ct. 648, 658 (Brewer, J.).

<sup>35</sup> *Virginia v. West Virginia* (1918) 246 U. S. 565, 600, 38 Sup. Ct. 400, 405 (White, C. J.).

taxability under the Sixteenth Amendment and present Federal Income Tax Law of the salary of a Federal Judge;<sup>36</sup> in the case arising out of the indictment of United States Senator Truman H. Newberry and involving the constitutionality of the Federal Corrupt Practices Act.<sup>37</sup>

What of the future? Will the Publius letters continue to figure in decisions of the Court as they have in the past? Students of our political system will have little hesitation in saying yes. Vital constitutional questions are impending in the United States. Federal encroachment upon State power is the most impressive political phenomenon of the time. It is bound to be involved more and more in cases coming up for review by the Supreme Court. On no other topic do the Federalist papers speak with greater weight. Their authors foresaw that such encroachment might some day be threatened (though the popular impulse in their day was in the other direction) and discussed the possibility with anxious care. Originally written in support of the grant of powers to the National Government, these papers have come to be one of the strongest bulwarks of State rights.

They will also be potent in defense against assaults upon the judiciary, especially upon the power of the Supreme Court to declare legislative acts unconstitutional. Men in high political position are denouncing the assumption of this power by the Court as judicial usurpation, originated by John Marshall. They forget that one of the clearest and most persuasive arguments in support of the power ever formulated is found in Federalist No. LXXVIII, written by Alexander Hamilton before the Constitution had been adopted and twelve years before Marshall ascended the bench.

A list of the cases, so far as the writer has been able to discover them, in which The Federalist has been cited in opinions of the United States Court is appended. Much effort has been expended to make the list complete. However as the citations are scattered through two hundred and sixty volumes of Supreme Court Reports containing more than one hundred and fifty thousand printed pages, and are nowhere indexed, it would be rash to assert too positively that none has been overlooked. The cases are:

*Calder v. Bull*, *supra* note 2; *Fletcher v. Peck*, *supra* note 4; *McCulloch v. Maryland*, *supra* note 5; *Houston v. Moore*, *supra* note 7; *United States v. Smith*, *supra* note 8; *Cohens v. Virginia*, *supra* note 9; *Martin v. Mott* (1827) 12 Wheat. 19, 30 (Story, J.); *Ogden v. Saunders* (1827) 12 Wheat. 213, 304, 306 (Thompson, J.), 329-331 (Trimble, J., dissenting); *Brown v. Maryland*

<sup>36</sup> *Evans v. Gore* (1920) 253 U. S. 245, 249-250, 252-253, 254, 40 Sup. Ct. 550, 551, 552, 553 (Van Devanter, J.); 253 U. S. 265, 40 Sup. Ct. 557 (Holmes, J., dissenting).

<sup>37</sup> *Newberry v. United States* (1921) 256 U. S. 232, 248-249, 255-256, 41 Sup. Ct. 469, 471, 474 (McReynolds, J.); 256 U. S. 283, 284, 41 Sup. Ct. 483 (Pitney, J., concurring in part).

(1827) 12 Wheat. 419, 456 (Thompson, J., dissenting); *Weston v. City Council of Charlestown* (1829) 2 Pet. 449, 469 (Marshall, C. J.), 477 (Thompson, J., dissenting); *The Cherokee Nation v. Georgia* (1831) 5 Pet. 1, 41 (Baldwin, J.), 64 (Thompson, J., dissenting); *Wheaton v. Peters* (1834) 8 Pet. 591, 681, 685 (Thompson, J., dissenting); *City of New York v. Miln*, *supra* note 10; *Briscoe v. Bank of Kentucky* (1837) 11 Pet. 257, 332, 333 (Story, J., dissenting); *Kendall v. United States* (1838) 12 Pet. 524, 643, 644 (Barbour, J.); *Prigg v. Pennsylvania*, *supra* note 11; *Nelson v. Carland* (1843) 1 How. 265, 269, 272, 273 (Catron, J., dissenting); *Fox v. Ohio* (1847) 5 How. 410, 439 (McLean, J., dissenting); *Waring v. Clarke* (1847) 5 How. 441, 481, 488, 493, 494 (Woodbury, J., dissenting); *License Cases*, *supra* note 12; *Planters' Bank v. Sharp* (1848) 6 How. 301, 319 (Woodbury, J.); *Luther v. Borden*, *supra* note 13; *Passenger Cases*, *supra* notes 14-19; *Cooley v. Board of Wardens*, *supra* note 20; *Veazie v. Moor* (1852) 14 How. 568, 575 (Daniel, J.); *Marshall v. Baltimore & Ohio R. R.* (1853) 16 How. 314, 326 (Grier, J.), 351 (Campbell, J., dissenting); *State Bank of Ohio v. Knoop* (1853) 16 How. 369, 397 (Catron, J., dissenting); *United States v. Guthrie* (1855) 17 How. 284, 306, 307 (McLean, J., dissenting); *Florida v. Georgia* (1855) 17 How. 478, 518, 520 (Campbell, J., dissenting); *Dodge v. Woolsey*, *supra* note 21; *Dred Scott v. Sandford*, *supra* note 23; *Jackson v. Steamboat Magnolia* (1858) 20 How. 296, 332 (Campbell, J., dissenting); *Gilman v. Philadelphia*, *supra* note 25; *Gordon v. United States* (1864) 117 U. S. 697, 701 (posthumous opinion by Taney, C. J.); *Ex parte Garland* (1867) 4 Wall. 333, 388 (Miller, J., dissenting); *Lane County v. Oregon*, *supra* note 26; *Pacific Insurance Co. v. Soule* (1868) 7 Wall. 433, 445, note (Swayne, J.); *Woodruff v. Parham* (1869) 8 Wall. 123, 135 (Miller, J.); *The Justices v. Murray*, *supra* note 27; *Legal Tender Cases*, *supra* note 28; *Scholey v. Rew* (1875) 23 Wall. 331, 348 (Clifford, J.); *Clafin v. Houseman* (1876) 93 U. S. 130, 138 (Bradley, J.); *Hall v. DeCuir* (1878) 95 U. S. 485, 516 (Clifford, J., concurring); *Edwards v. Kearzey* (1878) 96 U. S. 595, 606 (Swayne, J.); *Transportation Company v. Wheeling* (1879) 99 U. S. 273, 280 (Clifford, J.); *Sinking Fund Cases* (1879) 99 U. S. 700, 736 (Strong, J., dissenting), 765 (Field, J., dissenting); *Ex parte Clarke* (1880) 100 U. S. 399, 412, 417, 418 (Field, J., dissenting); *Springer v. United States* (1881) 102 U. S. 586, 596 (Swayne, J.); *Kring v. Missouri* (1883) 107 U. S. 221, 226, 2 Sup. Ct. 443, 448 (Miller, J.); *Legal Tender Case* (1884) 110 U. S. 421, 470, 4 Sup. Ct. 122, 141 (Field, J., dissenting); *Fort Leavenworth R. R. v. Lowe* (1885) 114 U. S. 525, 529, 5 Sup. Ct. 995, 997 (Field, J.); *Wisconsin v. Pelican Insurance Co.* (1888) 127 U. S. 265, 289, 8 Sup. Ct. 1370, 1374 (Gray, J.); *Hans v. Louisiana* (1890) 134 U. S. 1, 12-13, 10 Sup. Ct. 504, 506 (Bradley, J.); *Leisy v. Hardin*, *supra* note 32; *McAllister v. United States* (1891) 141 U. S. 174, 197, 11 Sup. Ct. 949, 957 (Field, J., dissenting); *McPherson v. Blacker* (1892) 146 U. S. 1, 36, 13 Sup. Ct. 3, 11 (Fuller, C. J.); *Pollock v. Farmers' Loan & Trust Co.*, *supra* note 33 (two reports); *Placquemines Fruit Co. v. Henderson* (1898) 170 U. S. 511, 514, 515, 516, 18 Sup. Ct. 685, 687 (Harlan, J.); *Capital Traction Co. v. Hof* (1899) 174 U. S. 1, 6-8, 19 Sup. Ct. 580, 582-583 (Gray, J.); *Smith v. Reeves* (1900) 178 U. S. 436, 447, 20 Sup. Ct. 919, 923 (Harlan, J.); *Fairbank v. United States*, *supra* note 34; *Dooley v. United States* (1901) 183 U. S. 151, 169, 22 Sup. Ct. 62, 69 (Fuller, C. J.); *Hanover National Bank v. Moyses* (1902) 186 U. S. 181, 187, 22 Sup. Ct. 857, 860 (Fuller, C. J.); *South Dakota v. North Carolina* (1904) 192 U. S. 286, 336, 24 Sup. Ct. 269, 283 (White, J., dissenting); *United States v. Gradwell* (1917) 243 U. S. 476, 484, 37 Sup. Ct. 407, 410 (Clarke, J.); *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 228, 37 Sup. Ct. 524 (Pitney, J., dissenting); *Virginia v. West Virginia*, *supra* note 35; *Evans v. Gore*, *supra* note 36; *Newberry v. United States*, *supra* note 37.